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In the Supreme Court of the United States

October Term, 1972
No. 72-1404

JEAN MURRELL CAPERS *et al.*,
Petitioners,

vs.

CUYAHOGA COUNTY BOARD OF ELECTIONS, ROBERT E. HUGHES, JOHN J. CARNEY, JOSEPH BARTUNEK and SAUL G. STILLMAN, AS THE BOARD OF ELECTIONS OF CUYAHOGA COUNTY, OHIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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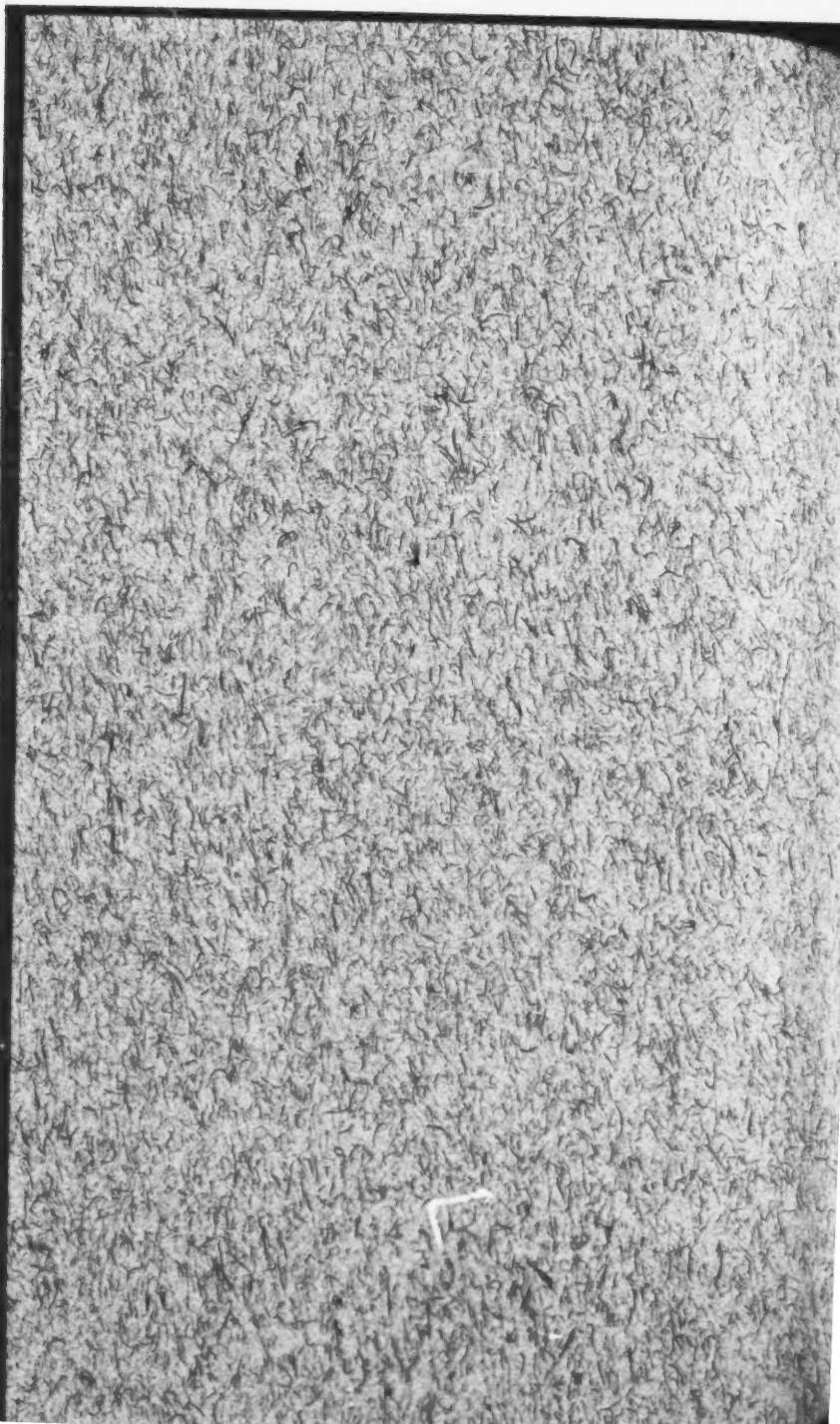

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QUESTIONS PRESENTED

(1) Is a District Court's order taxing attorney's fees as costs appealable where the power to tax under the facts and circumstances of the particular case is challenged?

(2) Where the sole remaining issue in a case is the power of the District Court to tax attorney's fees as costs, is such a case appealable on that sole issue?

(3) Are attorney's fees, taxable as costs, to be routinely awarded to every successful plaintiff who brings an action under Title 28, U.S.C.A., Sections 1331 and 1343, regardless of a failure to show bad faith or willful, obdurate, obstinate conduct on the part of the defendants?

STATUTES INVOLVED

The plaintiffs invoked the jurisdiction of the District Court under the provisions of Title 28, U.S.C.A., Sections 1331 and 1343, which are set forth in the Appendix.

STATEMENT OF THE CASE

Although Rule 40 (2) (e) of this Court, requiring a concise statement of the case does not explicitly limit a party to the record in the trial court, the respondents assume such a stricture to be implied as a part of proper appellate procedure.

If the respondents' assumption is correct, the allowance by this Court of a writ of certiorari based upon the petitioners' statement of the case would be improvident. The material set forth in the second, third, and fourth full paragraphs on page 5 of the petition and the material beginning in the last paragraph of page 5 and concluding at the end of the fourth line of page 6 does not appear anywhere in the record of this case.

For a complete picture of the circumstances in which attorney's fees were awarded, it may be noted, as the *record*, will show that District Judge Battisti simultaneously adjudicated respondents' counsel, John L. Dowling, Assistant Prosecuting Attorney, in contempt of court and imposed a heavy fine as a result of counsel's request to Judge Lambros to step out of the case. This judgment was also reversed by the Sixth Circuit Court of Appeals on January 17, 1973.

ARGUMENT

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Court of Appeals Properly Entertained the Appeal on the Taxing of Attorney's Fees As Costs, Because the Respondents Challenged the Power of the District Court to Do So under the Facts and Circumstances of This Case.

It has consistently been the position and contention of the respondents that the District Court lacked the *power* to assess attorney's fees as costs against them where the respondents are not guilty of bad faith or of willful, obstinate, obdurate conduct (*p. 7 of Petition*). Stated another way, it is asserted that a mere technical violation of the principles enunciated in Title 28, U.S.C.A., Sections 1331 and 1343, does not confer upon the court the authority to assess attorney's fees in the absence of a provision therefor by statute.

The principle is stated explicitly in Syllabus 1, of *Intertype Corporation v. Clark-Congress Corporation*, 249 F.2d 626 (2nd Cir. 1957):

> "Generally, an appeal does not lie from order assessing costs when question presented does not concern power to act, but such rule does not apply when *power or right of court to assess certain items of cost* is in dispute." (Emphasis added.)

Numerous cases have held that an appeal from an award of costs will lie not only in those cases in which the power of the court to assess particular items as costs is in issue, but also in those cases in which there has been an abuse of discretion. 6 MOORE'S FEDERAL PRACTICE, Par. 54.70

(5), cited by petitioners at pp. 11-12. Citations in support of the foregoing proposition are: *McKnight v. Akins,* 192 F.2d 674 (6th Cir. 1951); *Chicago Sugar Co. v. American Sugar Co.,* 176 F.2d 1 (7th Cir. 1949); *Adventures in Good Eating v. Good Places to Eat,* 131 F.2d 809 (7th Cir. 1942); *Kemart Corp. v. Printing Arts Research Labs, Inc.,* 232 F.2d 897 (9th Cir. 1956); *Farmer v. Arabian American Oil Co.,* 324 F.2d 359 (2d Cir. 1963), *rev'd on other grounds,* 379 U.S. 227; *Association of Western Rys. v. Riss & Co.,* 320 F.2d 785 (D.C. Cir. 1963); *Fleischer v. A.A. P., Inc.,* 36 F.R.D. 31 (S.D. N.Y. 1964).

2. A Case Is Appealable on the Sole Issue of Costs Where Such Sole Issue Concerns the Power of the Trial Court to Tax Attorney's Fees As Costs.

Reasons I and II set forth in the petition are inextricable. Likewise, in opposition to these two reasons, consideration of the respondents' position necessarily results in a merger of reasons (1) and (2). Therefore, the argument and citations of authority which appear under (1) above are, in large part, applicable to (2). In that regard, one of the decisions of this Court, cited and quoted in the petitioners' argument, is dispositive of the first and second reasons on both sides. The case is *Newton v. Consolidated Gas Company,* 265 U.S. 78, which is quoted at page 9 of the Petition, as follows:

> "The rule forbidding appeals from decrees for costs only is easily deducible from the discretion in the trial court in fixing them and the better opportunity of that court to exercise that discretion from its greater intimacy with details of the pleadings, hearings, and orders in the case. When the power of the court to

> assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are not allowed. But the rule is not absolute and should not be enforced to assess as costs against a fund or a party expenditures of a class not legally assessable as such. Where a question of this kind is made, appeals have been allowed."

The respondents contend, in accordance with the doctrine of *Newton,* and as found by the Sixth Circuit Court of Appeals in the case at bar, that attorney's fees are not legally assessable in a case of this kind where the record does not show that the assessed party is guilty of bad faith or of willful, obstinate, obdurate defiance of law (Petition, Appendix C).

3. Attorney's Fees Should Not Be Routinely Awarded in a Case Brought under Title 28 U.S.C.A., Sections 1331 and 1343, but May Be Awarded Where the Record Establishes Bad Faith or Willful, Obstinate, Obdurate Conduct on the Part of the Defendant.

The petition inaccurately implies that the case at bar was brought under the provisions of Title 42 U.S.C.A., Sections 1981, 1982 and 1983. The Complaint specifically relies solely upon Title 28 U.S.CA., Sections 1331 and 1343. These sections are expressive of congressional policy as to monetary allowances, and they do not include attorneys' fees.

Unlike the cases cited by the petitioners, the *Capers* case was not brought as a class action. It did not create a fund. The petitioners admit (*page 11 of Petition*) that Mrs. Capers failed to qualify as a candidate, despite the fact that the filing deadline would be August 18 rather

than the June 29 deadline which she had expected to meet all along.

In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), this Court allowed attorney fees as costs because the expenses petitioners incurred were for the benefit of the corporation and other stockholders. The record of the *Capers* trial discloses no comparable situation in this case, which is confined to the City of Cleveland mayoralty race. As the caption itself shows, the Board of Elections is a *county* board and the assessment of costs against it falls upon the taxpayers of Cuyahoga County, the majority of whom reside outside of the City of Cleveland. The basis of the award in *Mills* was the fact that it resulted in litigation expenses being spread among corporate shareholders who benefited from the litigation. Assuming, arguendo, that other would-be independent candidates were benefited by the action of Mrs. Capers, there is no conceivable way in which assessing her attorney fees as costs can be respread between or among such independent candidates.

Fairly read, it would seem that the petitioners, at this juncture of the appellate proceedings, are contending for a universal rule that successful plaintiffs in cases under Title 28 U.S.C.A. Sections 1331 and 1343, should always have their attorney fees taxed as costs against the defendants therein, regardless of the defendants' lack of bad faith and of willful, obdurate, obstinate conduct. This latter-day assertion is a drastic departure from, and a radical reversal of, the admission made by petitioners' counsel in the trial court, at page 31 of Volume III of the Appendix filed in the Court of Appeals (p. 256 of the entire Appendix):

> "I would agree with Mr. Dowling that before an award of attorney fees can be made, there has to be some

showing that the party on the other side acted in a reprehensible way, that he did something improper or that it was malicious or otherwise—well, improperly motivated. Let's say it that way."

CONCLUSION

Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied for the reason that the decision by the Court of Appeals and the record before it do not present a suitable vehicle for the exercise of this Court's "sound judicial discretion" to review on writ of certiorari, under the considerations expounded by Rule 19 of this Court. Respondents also request the award in their favor of such costs on appeal as are appropriate under the rules of this Court.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

JOHN L. DOWLING,

Assistant Prosecuting Attorney of Cuyahoga County, Ohio

Attorneys for Respondents

APPENDIX

TITLE 28, U.S.C.A., SECTION 1331

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

TITLE 28, U.S.C.A., SECTION 1343

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

TITLE 42, U.S.C.A., SECTIONS 1981, 1982 AND 1983

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.